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Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOSEPH and RENNY FANGSRUD VON  
ESCH,

Plaintiffs,

vs.

LEGACY SALMON CREEK HOSPITAL, et  
al.,

Defendants.

Case No.: 3:16-CV-05842-BHS

ASSET SYSTEMS, INC.'S RESPONSE TO  
PLAINTIFFS' SUPPLEMENTAL BRIEFING  
RE: DEFENDANT'S 28 U.S.C. § 1927  
MOTION FOR ATTORNEY FEES AND  
COSTS

NOTE ON THE MOTION CALENDAR:  
January 20, 2021

Defendant Asset Systems, Inc.'s ("Asset's") reserved the right to respond to Plaintiffs' Supplemental Briefing if it was tardily filed. This is Asset's response to that tardy filing [Dkt. # 163].

Asset moved for sanctions against Plaintiffs' attorneys under 28 U.S.C. § 1927 and the inherent power of the Court based on the argument that Plaintiffs' attorneys' unreasonable, reckless, vexatious and harassing conduct in continuing to prosecute this case even after Plaintiffs received Asset's offer of judgment for more than Plaintiffs could hope to recover from Asset, and for the other reasons set forth in Asset's Motion for Attorney Fees. See Dkt. # 135;

ASSET SYSTEMS, INC.'S RESPONSE TO PLAINTIFFS'  
SUPPLEMENTAL BRIEFING RE: DEFENDANT'S 28  
U.S.C. § 1927 MOTION FOR ATTORNEY FEES AND  
COSTS -- Page 1  
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1 Dkt. # 142, p. 4-6 (10 ways in which Plaintiffs' attorneys multiplied these proceedings in bad  
 2 faith). Whether the Complaint filed by Plaintiffs' attorneys had merit, or not when the  
 3 Complaint was filed is irrelevant to Asset's motion for sanctions against Plaintiffs' attorneys.

4 What is relevant is whether Plaintiffs' attorneys should have continued to prosecute this  
 5 case after receipt of Asset's offer of judgment.

6 Plaintiffs' Supplemental Briefing is just another example of Plaintiffs' attorneys' bad  
 7 faith conduct in needlessly increasing the cost of litigation to Asset, and Plaintiffs' attorneys  
 8 abusing the judicial process.

9 Asset moves to strike Plaintiffs' Supplemental Briefing and the irrelevant and  
 10 inadmissible filing attached to it for the reasons that follow.

11 The express purpose of Plaintiffs' Supplemental briefing is to argue that "This was not a  
 12 frivolous case." Dkt. # 163, p. 1. Whether Plaintiffs' case was frivolous, or not is irrelevant to  
 13 whether Plaintiffs' attorneys should have continued to prosecute the case, or whether this Court  
 14 should award sanctions against Plaintiffs' attorneys under 28 U.S.C. § 1927 or the inherent  
 15 power of the Court when Plaintiffs' attorneys continued to prosecute the case after receipt of  
 16 Asset's offer of judgment.

17 In response to Asset's Motion for Attorney Fees, Plaintiffs' attorneys have failed to  
 18 illustrate to this Court that they had any evidence of damages caused by Asset's conduct at issue  
 19 in the Complaint that exceeded Asset's offer of judgment for \$2,500, plus costs and attorney  
 20 fees.

21 Asset's conduct at issue in the Complaint was sending two letters that demanded the  
 22 wrong amount—one to each Plaintiff. Plaintiff had no evidence of damages, including  
 23 emotional distress caused by either letter. Mrs. Esch received her letter at Mrs. Esch's request  
 24 after Mrs. Esch requested it in a phone conversation with Asset. Mr. Esch received his letter  
 25 because it was required by the FDCPA as Asset's initial demand on Mr. Esch, and included an  
 26 amount that had been verified by Legacy multiple times to Asset and to Mrs. Esch. See 15

1 U.S.C. § 1692g. Thus, Plaintiffs’ attorneys knew, or should have known, when Asset’s offer of  
 2 judgment was made, that Plaintiffs’ attorneys could not prove damages in excess of the offer of  
 3 judgment based on Asset’s sending, and Plaintiffs’ receipt of these two letters. Plaintiffs’  
 4 supplemental briefing does not address this issue at all.

5 The other conduct at issue in Plaintiffs’ Complaint was the allegation that Asset  
 6 threatened Plaintiffs with litigation in March 2016. However, Plaintiffs conceded at trial, and in  
 7 deposition that Asset never threatened Plaintiffs’ with litigation. Plaintiffs’ attorneys knew, or  
 8 should have known that Asset never threatened Plaintiffs with litigation because since January  
 9 30, 2017, Plaintiffs’ attorneys had possession the recording of the call that formed the basis for  
 10 the Complaint allegation (a notation in ***Legacy’s*** notes) that Asset threatened Plaintiffs with  
 11 litigation. Plaintiffs’ attorneys received the recording with Legacy’s Initial Disclosures—nearly  
 12 three months before Asset made its global offer of judgment. Notwithstanding Plaintiffs’  
 13 attorneys’ possession of this recording, and notwithstanding their client’s own deposition  
 14 testimony that Asset had not threatened Plaintiffs with litigation, Plaintiffs attorneys continued to  
 15 argue that Asset threatened Plaintiffs with litigation. Mrs. Esch’s trial testimony refuting this  
 16 allegation resulted in Judge Leighton stating, “There was no lawsuit threatened by the billing  
 17 company [Asset].” See Dkt. #150, p. 2. Plaintiffs’ Supplemental Briefing does not address this  
 18 issue either.

19 The arguments in Plaintiffs’ Supplemental Briefing related to the merits of filing the  
 20 Complaint are irrelevant to the issues raised in Asset’s Motion for Sanctions.

21 The fundamental goal of sanctions is deterrence. If an aggrieved party knows beforehand  
 22 that it has no hope of recovering the costs necessary to have the other party sanctioned, it will be  
 23 less likely to seek sanctions. The less likely that aggrieved parties are to pursue sanctions, the  
 24 more sanctionable conduct will go unsanctioned, and the weaker the deterrent will be. Parties  
 25 who know that the likelihood of facing a sanctions proceeding is low may engage in sanctionable  
 26 conduct more often. *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1299 (11th Cir. 2010).

1 Plaintiffs' attorneys' failure to meet this Court's January 13, 2020 deadline is further  
2 support for the need for sanctions against Plaintiffs' attorneys.

3 Plaintiff's attorney, Mr. Mitchell, claims excusable neglect based on his mother being  
4 stricken with COVID during an unspecified period of time, and other cases. While it is  
5 regrettable that Mr. Mitchell's mother was stricken with COVID, neither of these reasons are  
6 excusable.

7 If Plaintiffs' attorneys needed more time, Plaintiffs' attorneys had seven days to move for  
8 more time under LCR 7. In fact, when Plaintiffs' attorneys were late, Plaintiffs' attorneys should  
9 have moved for more time with this Court rather than just filing the reply outside of the deadline  
10 imposed by this Court. This is the second time since Judge Settle was assigned this case that  
11 Plaintiffs missed a filing deadline. In the first instance, Asset's response cited the local rule  
12 requirement of moving for relief from a deadline. See Dkt. # 160, p. 3; LCR 7 (j). Plaintiffs'  
13 attorneys continue to ignore the requirements of our local rules.

14 A review of the dockets referred to in Mr. Mitchell's Declaration show that there is little  
15 evidence that Mr. Mitchell was overwhelmed assisting servicemembers with claims between  
16 January 5, 2021 and January 13, 2021—the due date of Plaintiffs' Supplemental Briefing. See  
17 Dkt. #163-1; attached dockets; and Dkt. # 161. Further, why wasn't Mr. Mitchell's actions or  
18 inactions on these other cases affected by Mr. Mitchell's mother being stricken with COVID  
19 when Mr. Mitchell's conduct in our case was?

20 The other reason that the neglect is not excusable is that Ms. Hutchison is, and has been  
21 co-counsel in this case. Ms. Hutchison should have seen that Plaintiffs' Supplemental Briefing  
22 was timely filed herself, or should have moved for more time. Ms. Hutchison did not so act, and  
23 there is no word from Ms. Hutchison on why Ms. Hutchison did not act to obtain an extension,  
24 or file Plaintiffs' Supplemental Briefing herself.

25 What is clear is that Asset's reply notifying Mr. Mitchell that the deadline had not met  
26 was filed on January 14, 2021 at 9:56 AM PT [Dkt. # 162]; and Plaintiffs' Supplemental Briefing

1 was filed on January 14, 2021 at 4:26 PM PT [Dkt. # 163]. Asset's January 14, 2021 reply  
2 resulted in Plaintiffs' Supplemental Briefing.

3 Plaintiffs' attorneys fail to show excusable neglect in failing to comply with this Court's  
4 deadline for filing their Supplemental brief, and Asset's attorney fees incurred in filing their  
5 replies should further be allowed against Plaintiffs' attorneys for continuing their prosecution of  
6 this case under 28 U.S.C. § 1927 or the inherent power of the Court.

7 Further, the submissions by Plaintiffs' attorneys [Dkt. # 163-4 and 163-5] are irrelevant  
8 hearsay and should also be stricken.

9 Dkt. # 163-4 is irrelevant hearsay as it purports to be a consent decree entered into by a  
10 hospital that was neither a party, nor an assignor in this case. It was entered into by that non-  
11 party hospital three years after the conduct at issue by Asset and Legacy. That information has  
12 no bearing on whether sanctions should be awarded in this case or not.

13 Dkt. # 163-5 is irrelevant hearsay. Plaintiffs' attorney could not have a good faith belief  
14 that this document would be admissible without any foundation, or any show of relevancy to the  
15 facts of this case. It has no bearing on whether sanctions should be awarded in this case or not.

16 As to the content of Plaintiffs' Supplemental Briefing, Plaintiffs' Supplemental Briefing  
17 does not "add 'facts and realities' brought to light during the appeal"—the stated purpose to this  
18 Court of Plaintiffs' Supplemental Briefing. See Dkt. # 161, p. 2. Thus, Plaintiffs' Supplemental  
19 Briefing shows that the statements made in Plaintiffs Response to Defendant's Motion to Lift  
20 Stay [Dkt. # 159] about what Plaintiffs' Supplemental Briefing would show are just more  
21 misrepresentations to this Court by Plaintiffs' attorneys that illustrate the need for sanctions  
22 against Plaintiffs' attorneys based on the inherent power of the court.

23 The allegation in Plaintiffs' Supplemental Briefing that the litigation worked to protect  
24 thousands of consumers [Dkt. # 163, p. 2-3] was already briefed in Plaintiffs' original  
25 Opposition to Asset's Motion for Fees. See Dkt. # 141, p. 11. That argument is irrelevant to  
26 Asset's argument for attorney fees since it does not refute the argument that Plaintiffs' attorneys

1 should not have continued prosecution of this action after Asset's offer of judgment. That  
 2 argument is not a fact brought to light during the appeal. Thus, repeating that argument in this  
 3 Supplemental Briefing, and failing to tie this argument to a fact brought to light during the appeal  
 4 is just another reason that the court should award Asset sanctions against Plaintiffs' attorneys.

5 Plaintiffs' Supplemental Briefing argument 1B(1) [Dkt. # 163, p. 3-4] is also irrelevant to  
 6 whether this court should award Asset sanctions under 28 U.S.C. § 1927 or the inherent power of  
 7 the Court for continuing to prosecute this claim after the offer of judgment. The Ninth Circuit  
 8 held that "Asset presented sufficient evidence—which remains unrebutted—to prove its  
 9 procedures were 'reasonably adapted' to avoid demanding the wrong principal sum." Dkt. #  
 10 153. Asset was not required to have *every* procedure in place. Asset was only required to have  
 11 *reasonable* procedures in place, and the requirement that Asset have reasonable procedures in  
 12 place was found satisfied by the Court of Appeals by unrebutted evidence. Plaintiffs' attorneys  
 13 seem to argue there was reason to take the issue of *liability* to trial. However, whether there was  
 14 evidence that Asset violated the FDCPA, or not is not the issue as to whether Plaintiffs' attorneys  
 15 should or should not be sanctioned. The issue for Asset's Motion for Sanctions is whether  
 16 Plaintiffs had evidence of damages in excess of \$2,500. Plaintiffs and their attorneys never had  
 17 evidence of damages in excess of \$2,500 based on Asset's conduct, and Section 1B(1) of  
 18 Plaintiffs' Supplemental Briefing is irrelevant to that issue. Causing Asset to respond to this  
 19 argument by Plaintiffs' attorneys is further evidence why Plaintiffs' attorneys should be  
 20 sanctioned by this Court.

21 Plaintiffs Supplemental Briefing argument 1B(2) [Dkt. # 163, p. 4-5] is also irrelevant to  
 22 whether this court should award Asset sanctions under 28 U.S.C. § 1927 or the inherent power of  
 23 the Court for continuing to prosecute this claim after the offer of judgment. It is not a fact  
 24 brought to light during the appeal. General medical collection is not the issue as to whether  
 25 Plaintiffs' attorneys should be sanctioned or not. Neither is the issue whether or not Plaintiffs'  
 26 Complaint was frivolous. Plaintiffs' attorneys' argument is also based on inadmissible evidence.

1 Causing Asset to respond to this argument by Plaintiffs' attorneys is further evidence why  
 2 Plaintiffs' attorneys should be sanctioned by this Court.

3 Plaintiffs Supplemental Briefing argument that Asset is not the prevailing party is even  
 4 more specious. See Dkt. # 163, p. 5-6. Asset was awarded a directed verdict, and that verdict  
 5 was affirmed on appeal. Asset was and is the prevailing party. This also was not a fact brought  
 6 to light in the appeal. However, Asset is not requesting sanctions based on the fact that Asset is  
 7 the prevailing party. Asset is requesting sanctions against Plaintiffs' attorneys because of  
 8 Plaintiffs' attorneys conduct in prosecuting this case after Asset's offer of judgment. Whether  
 9 the case filed was frivolous or not is irrelevant to whether Plaintiffs' attorneys should be  
 10 sanctioned for multiplying these proceedings after Asset's offer of judgment.

11 By its very definition, 28 U.S.C. § 1927 are not sanctions for *filing* a frivolous action. 28  
 12 U.S.C. § 1927 sanctions are the penalty for multiplying the proceedings in any case  
 13 "unreasonably and vexatiously". Asset's evidence of such unreasonable and vexatious conduct  
 14 in multiplying these proceedings by Plaintiffs' attorneys is unrefuted. Plaintiffs' attorneys only  
 15 contrary argument—that the action was not frivolous—does not refute Asset's evidence that  
 16 Plaintiffs' attorneys acted in bad faith in continuing the proceedings.

17 Imposition of sanctions under 28 U.S.C. § 1927 requires a finding of recklessness or bad  
 18 faith on the part of the attorney sanctioned. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107  
 19 (9th Cir. 2002).

20 ... if a court finds "that fraud has been practiced upon it, or that the very temple of  
 21 justice has been defiled," it may assess attorney's fees against the responsible  
 22 party, as it may when a party "shows bad faith by delaying or disrupting the  
 23 litigation or by hampering enforcement of a court order". The imposition of  
 24 sanctions in this instance transcends a court's equitable power concerning  
 25 relations between the parties and reaches a court's inherent power to police itself,  
 26 thus serving the dual purpose of "vindicat[ing] judicial authority without resort to  
 the more drastic sanctions available for contempt of court and mak[ing] the  
 prevailing party whole for expenses caused by his opponent's obstinacy."  
 [Citations omitted.]

*Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).



1 Asset has shown unrefuted evidence that Plaintiffs' attorneys acted in bad faith in  
 2 multiplying these proceedings after Asset's offer of judgment was made for more than the  
 3 amount of damages Plaintiffs could prove at trial. Causing Asset to respond to this argument by  
 4 Plaintiffs' attorneys is further evidence why Plaintiffs' attorneys should be sanctioned by this  
 5 Court.

6 No additional argument has come forward in Plaintiffs' Supplemental Briefing related to  
 7 the **amount** of attorney fees and costs requested by Asset as sanctions. Plaintiffs continue their  
 8 position in their Supplemental Briefing of failing to object to the **amount** of attorney fees and  
 9 costs requested by Asset in their Supplemental Briefing. Thus, the Court should allow all of the  
 10 costs requested by Asset (\$13,427.68) against Plaintiffs and their attorneys; and all of the  
 11 attorney fees requested by Asset (\$103,465.50) against Plaintiffs and their attorneys. See Dkt. #  
 12 142, p. 2.

13 No additional argument has come forward in Plaintiffs' Supplemental Briefing related to  
 14 Plaintiffs liability for attorney fees based on 15 U.S.C. § 1692k(a)(3). Thus, the Court should  
 15 allow Asset to recover attorney fees against Plaintiffs in the sum of \$103,465.50 because the  
 16 unrefuted evidence shows that Plaintiffs brought this case in bad faith and for purposes on  
 17 harassment. See Dkt. # 142, p. 2-3; Dkt. # 135, p. 6-7.

18 No additional argument has come forward in Plaintiffs' Supplemental Briefing related to  
 19 Plaintiffs liability for costs. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371 (2013). Thus, the Court  
 20 should allow Asset to recover costs against Plaintiffs in the sum of \$13,427.68. See Dkt. # 142,  
 21 p. 3.

22 No additional argument has come forward in Plaintiffs' Supplemental Briefing related to  
 23 Plaintiffs and Plaintiffs' attorneys' liability for sanctions under the inherent power of the Court.  
 24 Thus, the Court should allow Asset to recover attorney fees against Plaintiffs and Plaintiffs'  
 25 attorneys in the sum of \$103,465.50 because the unrefuted evidence shows that Plaintiffs and  
 26 Plaintiffs' attorneys unreasonably and vexatiously multiplied these proceeds. See Dkt. # 142, p.



6-7.

Asset requests the following additional attorney fees (\$1,400.00) caused by Plaintiffs' attorneys conduct after this Court lifted the stay:

Date	Task	Hours Billed	Hourly Rate	Charge
1/13/2021	Multiple E-mail correspondence between client and me re status of Supplemental Response. Reviewed for response multiple times.	0.4	\$250.00	\$100.00
1/14/2021	Drafted Supplemental Reply for Court. Filed with Court. Reviewed Reply filed by opposing	1.2	\$250.00	\$300.00
1/15/2021	Prepared Reply to Supplemental Briefing. Contact with client re Supplemental Briefing strategy.	3.0	\$250.00	\$750.00
1/19/2021	Finalized and Filed Plaintiffs' Reply. Email from Client re Plaintiffs' Reply	1.0	\$250.00	\$250.00
	Total			\$1,400.00

Asset requests the Court allow Asset's Motion, and award Asset a judgment against Plaintiffs and Plaintiffs' attorneys, jointly and severally, for \$104,865.50 attorney fees, plus \$13,427.68 costs.

Asset requests that the Court strike Plaintiffs Supplemental Briefing [Dkt. # 163], and its accompanying documents for being filed after the Court's Order, and/or Ordering Plaintiffs' attorneys to show cause why they should not be held in contempt for violating this Court's Order.

Dated: January 19, 2021.

s/ Jeffrey I. Hasson  
 Jeffrey I. Hasson, WSBA#23741  
 Hasson Law, LLC  
 Attorney for Asset

Certificate of Service

I hereby certify that on January 19, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Robert Mitchell, SaraEllen Hutchison and I hereby certify on that I mailed by United States Postal Service the document to the following:

s/ Jeffrey I. Hasson  
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